United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-1054

B P/S

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Respondent,

against

LEON GREENBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York

APPELLANT'S REPLY BRIEF

HERALD PRICE FAHRINGER
Attorney for Appellant
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
Of Counsel

April 2, 1976

TABLE OF CONTENTS

Preliminary Statement

Appellant's brief was filed on February 27, 1976 and the Government's answering brief was received on April 1, 1976 (proofs were obtained on March 30).

This reply brief is filed in response to the Government's brief. For the sake of convenience, we have identified the issues in an abbreviated form, such as "Sufficiency of Evidence," the "Search and Seizure" issue and the "Substantial Doubt" issue.

I.

Sufficiency of Evidence

It is hard to understand how the Government can in good conscience, attempt to repudiate the defense that the horsemen's outings actually occurred and thus were properly paid for. An impressive array of witnesses verified the outings.

Peter Donnelly - Coral Gables, Florida - former golf pro from Grossinger's who swore that about 6 horsemen's outings were held at the Hotel in 1970 (344)

James Curran - Fern Park, Florida - driver and trainer who swore that he attended 5 outings held at Grossinger's in the summer of 1970 (363).

Herman Carbonne - Bayside, New York - driver-trainer for 23 years - testified that he attended outings at Grossinger's in 1970 and played softball (401).

Robert DelCampo - Monticello, New York - driver-trainer - stated he attended 4 or 5 outings in July and August of 1970 at Grossinger's (414-415).

Richard Manzi - Smallwood, New York - driver-trainer - swore he attended 3 outings at Grossinger's in 1970 and won a golf trophy (384).

George Berkner - Kiamesha, New York - driver-trainer - attended a golf outing at Grossinger's in 1970 (396-399).

Hyman Hoffer - Assistant Maitre d' at Grossinger's - swore that horsemen's outings took place at the Hotel in 1970 (456, 457). The arrangements for the outings were made through him (457).

Bernard Roth - Grossinger's Comptroller - acknowledged that the Hotel regularly entertained horsemen from the Raceway (96, 97).

Paul Grossinger - President of Grossinger's Hotel - conceded at least 1 horsemen's outing took place in the summer of 1970 (185, 195). He instructed Bernard Roth to make up statements for the horsemen's outings which took place during the summer of 1970 at Grossinger's (52).

Robert Schoonmaker - Monticello Raceway Comptroller - testified that in 1970 he attended 3 or 4 golf outings at Grossinger's (239).

Is it likely that Leon Greenberg could have supplied Bernard Roth with the exact dates and the number of men who attended the outings if he did not have the attendance sheets for those affairs obtained from the publicity department (324, 435)? There is absolutely no way Leon Greenberg could have made up this vital information. Roth conceded that Leon Greenberg furnished him with the exact dates and the number of men who attended the outings (53, 54, 107, 108).

Circumstantial Evidence

It was undisputed that during the racing season (March through October) (Gov't Brf. at 18) horsemen's outings were held every Wednesday (374). Thus, there would have been 35 outings during the racing season held at hotels in the Catskills. Since there were only about 5 hotels in the area with suitable golf courses, at least 6 outings would have been held at Grossinger's. Significantly, the horsemen testified that Grossinger's was the most popular hotel among the horsemen (376). Since the Raceway spent at least $20,000 a year on the horsemen's outings, it is probable that $5,000 would have been spent for the Grossinger's outings (240).

The description of this respectable defense as "well orchestrated" is most unfortunate and unwarranted. Can it really be said that a golf pro from Florida, who had never met either Leon Greenberg or his counsel and who called Paul Grossinger before he testified, would

perjure himself? Is it believable that the Maitre d' from Grossinger's, a man 71 years old and Paul Grossinger's uncle, would lie about the horsemen's outings being held at Grossinger's in 1970 that he arranged? Is it probable that horsemen who were brought in from different parts of the country and who are now racing at different tracks would lie about the affairs being held at Grossinger's? It cannot be said that the jury rejected this proof. With proper instructions, i.e., if the jury found that the horsemen's outings took place (and thus were properly paid for), they could acquit the defendant, it is likely that the Appellant would have been found not guilty.

This Court's recent decision in United States v. Dixon, F.2d (2d Cir., March 12, 1976), Docket No. 75-1317, bears directly on our complaint that the mail fraud statute was misused in this case. In Dixon, the Court said:

> "When all is said and done, the Government's proof on the mail fraud counts was simply that Dixon had caused the mails to be used to receive proxies solicited by a proxy statement which did not contain information about loans to Dixon which it should have contained. To hold that this alone constituted any violation of the mail fraud statute would stretch its words beyond normal bounds; 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity' Rewis v. United States, 401 U.S. 808, 812 (1971), quoted and applied in United States v. Bass, 404 U.S. 336, 347-49 (1971), slip opinion at 2638.

See, also, United States v. Gibson Specialty Co., 507 F.2d 446 (9th Cir. 1974); United States v. Altobella, 442 F.2d 310 (7th Cir. 1971); United States v. McCormack, 442 F.2d 316 (7th Cir. 1971). Certainly, this prosecution expands the mail fraud statute far beyond its contemplated objectives and thus Appellant's conviction should be reversed and the indictment dismissed.

"Substantial Doubt" Issue

It may be useful to the Court to know that the great majority of the judges in the Eastern and Southern Districts of New York have avoided the "substantial doubt" charge when instructing juries in criminal cases. This survey was conducted by examining the records on appeal in which the Court's instructions were reproduced in the appendix.* Although the instructions of several judges in the Southern District were not located, most of them were canvassed. Listed on the following pages are the judges who have declined to use the "substantial doubt" instruction. Only Judges Pollack, Constance Baker Motley and John M. Cannella (the Aiken case) have used the "substantial doubt" instruction.

---

* Records on appeal are retained in the archives on the 18th floor of this Court Building for the past 3 years. Cases before 1973 are stored in New Jersey. This hampered our research.

List of Judges who have declined to use the term "substantial" in defining reasonable doubt

Southern District of New York

Hon. David N. Edelstein, C.J., United States v. Diogardi, 492 F.2d 70 (2d Cir. 1974) Docket No. 73-1759

Hon. Edward Weinfeld, United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969)

Hon. Lloyd F. MacMahon, United States v. Manarite, 448 F.2d 583 (2d Cir. 1971)

Hon. Charles H. Tenney, United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974)

Hon. Marvin E. Frankel, United States v. Coughlin, 515 F.2d 905 (2d Cir. 1975)*

Hon. Morris E. Lasker, United States v. Wilner, 521 F.2d 68 (2d Cir. 1975

Hon. Lawrence W. Pierce, United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975)

Hon. Charles L. Brieant, Jr., United States v. Nevedo, 516 F.2d 293 (2d Cir. 1975)

Hon. Arnold Bauman, United States v. Catalano, 491 F.2d 268 (2d Cir. 1974)

Hon. Lee P. Gagliardi, United States v. Jenkins, 510 F.2d 495 (2d Cir. 1975)

---

* (Judge Frankel stated in his charge that a reasonable doubt is "one that has substance"), at p. 63 of the Appendix.

Hon. Whitman Knapp, United States v. del Toro, 513 F.2d 656 (2d Cir. 1975)

Hon. Charles E. Stewart, Jr., United States v. Hall, 523 F.2d 665 (2d Cir. 1975)

Hon. Robert L. Carter, United States v. Frattini, 501 F.2d 1234 (2d Cir. 1974)

Hon. Robert J. Ward, United States v. Doulin, Docket No. 76-1070

Hon. Kevin Thomas Duffy, United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975)

Hon. William Conner, United States v. Reid, 517 F.2d 953 (2d Cir. 1975)

Hon. Henry F. Werker, United States v. Idarolo, Docket No. 75-365 (District Court number)

Eastern District of New York

Hon. Jacob Mishler, C.J., United States v. Lobo, 516 F.2d 883 (2d Cir. 1975)

Hon. John F. Dooling, Jr., United States v. Olivares, 495 F.2d 827 (2d Cir. 1974)

Hon. Jack B. Weinstein, United States v. Pfingst, 477 F.2d 177 (2d Cir. 1973)

Hon. Orrin G. Judd, United States v. Gerry, 515 F.2d 130 (2d Cir. 1975)

Hon. Mark A. Constantino, United States v. de Garces, 518 F.2d 1156 (2d Cir. 1975)

Hon. Edward R. Neaher, United States v. Clark, 498 F.2d 535 (2d Cir. 1974)

Hon. Thomas C. Platt, Jr., United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975)

Judges who have used the term "substantial" in defining reasonable doubt

Hon. Milton Pollack, United States v. Greenberg, Docket No. 76-1054

But see, United States v. Frank, 494 F.2d 145 (2d Cir. 1974) wherein he did not use the term "substantial" in defining reasonable doubt.

Hon. Constance Baker Motley, United States v. Bright, 517 F.2d 584 (2d Cir. 1975), reversed and remanded for a new trial on other grounds.

Hon. John M. Cannella, United States v. Aikin, 373 F.2d 294 (2d Cir. 1967).

In view of this statistical analysis demonstrating that the hazardous "substantial doubt" advice is given by only a few judges in this Circuit, it should be discontinued. The tide of the law is flowing away from this dubious instruction. The first, seventh and eighth circuits have rejected it and the sixth circuit has expressed great misgivings about its use.*

*United States v. Bridges, 499 F.2d 179 (7th Cir. 1974); United States v. Atkins, 497 F.2d 257 (8th Cir. 1973); United States v. Alvero, 470 F.2d 981 (5th Cir. 1973); United States v. Christy, 444 F.2d 448 (6th Cir. 1971).

Recently, the California Court of Appeals reversed a judgment of conviction because the trial judge delivered an instruction on reasonable doubt that lessened the State's burden of proof by watering down that standard to an unacceptable degree. People v. Garcia, Calif.Ct.App., 1st Dist., December 29, 1975, 18 CrL 2450. See, also, People v. Forest, A.D.2d , 377 N.Y.S.2d 492 (1st Dept. 1975).

The Constitutional stronghold of reasonable doubt should not be threatened by this handful of instructions afflicted with a"substanti 1 doubt" concept. Thus, Appellant's conviction should be reversed and a new trial should be ordered.

The Search and Seizure Issue

The Government seeks to defeat the Appellant's Fourth Amendment claim by urging the facts submitted in support of that claim are inadequate and that Appellant lacks standing. Significantly, the Government failed to deny one single fact urged in support of this grievance in the Court below. All the allegations made in support of this complaint were undenied by the Government. Furthermore, the facts furnished in support of this complaint covering some eleven full paragraphs of the defendant's omnibus motion were all a matter of public record and were irrefutable. Certainly, there was a sufficient factual basis mounted to warrant a hearing.

Appellant clearly has standing to manifest this Constitutional complaint under Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120 (1968). In DeForte, this Court, in a bold decision, held that a union official had standing to

complain about records unlawfully taken from the union offices. The Supreme Court endorsed this Court's conclusion, declaring:

> "We hold that in these circumstances DeForte had Fourth Amendment standing to object to the admission of the papers at his trial. It has long been settled that one has standing to object to a search of his office, as well as of his home. See, e.g., Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877; Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322; cf. Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462; Osborn v. United States, 385 U.S. 323, 87 S.Ct. 439, 17 L.Ed.2d 394."

Certainly, Leon Greenberg comes well within reach of the DeForte doctrine established by this Court. The records were taken from the corporate offices that he occupied. Our case is even stronger than DeForte's because on April 1, 1976, the New York Court of Appeals affirmed the decision of the Appellate Division, Third Department (Sussman v. New York State Organized Crime Task Force, 48 A.D.2d 154, 368 N.Y.S.2d 588 (3d Dept. 1975)) holding that the Monticello records were illegally taken. Sussman v. New York State Organized Crime Task Force, N.Y.2d ,

N.Y.S.2d (1976).

Certainly, under these compelling circumstances the very least Appellant was entitled to was a hearing on this substantial Constitutional claim. Appellant never consented to the Governments suppression of the records from the State and there is no evidence to support that contention.

The Accomplice Issue

The Court misadvised the jury:

> Two government witnesses, Paul Grossinger and Bernard Roth, admittedly participated in acts charged in the indictments as crimes. Thus, they are considered accomplices (640). (emphasis supplied)

This misinstruction had the effect of removing from the jury a critical fact question that properly belonged in their province. United States v. Singleton, F.2d (2d Cir. 1976); United States v. Natale, F.2d (2d Cir. 1975), Docket No. 75-1276; United States v. Hinds, 256 F.2d 561 (2d Cir. 1958).

It was inaccurate and wrong for the trial judge to label Roth and Grossinger accomplices. Neither admitted any complicity with the Appellant. On the contrary, they denied any wrongdoing (152, 206). Obviously, if the jurors concluded that Grossinger and Roth were not co-conspirators, then would have had to acquit Leon Greenberg of the charge of conspiracy. The trial court's instruction foreclosed

this option. Counsel had argued throughout the trial that no one had committed any crime because the outings occurred and were properly paid for. Accordingly, counsel did not request that the accomplice charge be given; nor was the defense advised in advance of the court's charge that this instruction would be furnished to the jury. Counsel vigorously objected to that advice after it was provided to the jury. Certainly, this preserves the error for this Court's review.

United States v. Abrams, 427 F.2d 86 (2d Cir. 1970), cited by the Government, supports Appellant's complaint. There, the defendant did not request the accomplice instruction, and accordingly, the Court did not give it. Abrams then complained in this Court that the instruction should have been given. The Court stressed:

> It is preferrable to charge the jury that accomplice testimony should be scrutinized with special care and caution. However, this Circuit does not require that the charge be given unless substantial prejudice results from its omission. 427 F.2d at 90.

In Abrams, it would appear as though the evidence of complicity was overwhelming. Certainly, Abrams does not hold that the accomplice instruction should be given despite defense counsel's request. Thus, the judgment of conviction should be reversed.

The Trial Court's Failure to Submit the Appellant's Theory of Defense to the Jury

In Appellant's opening brief a complaint was registered that the trial judge's failure to charge, in essence, if the jury believed that the horsemen's outings actually occurred, and thus were properly paid for, then they must find the defendant not guilty. The Court refused to give that instruction.

Recently, this Court in United States v. Ottley, 509 F.2d 667 (2d Cir. 1975) held, under similar circumstances, that a failure of this nature was reversible error. There the Court stressed:

> Defense counsel had requested a charge that if Ottley believed that the expenditures would benefit the union, or 'that they had been or would be authorized' by the union, he would not be guilty of violating Section 501(c). The court, however, refused to so charge.
>
> . . .
>
> The central question in a case such as this is usually whether the defendant had the

> requisite criminal intent. Under Silverman, we do not think that issue can be narrowed solely to whether the expenditure of union funds had been authorized or whether defendant believed that to be the case. . . . In short, we believe that the judge's charge unduly limited the jury's consideration of criminal intent. 509 F.2d 670, 671.

In this case, it is undisputed that the crucial conversations between Roth and Greenberg took place after the horsemen's outings were held at Grossinger's. Thus, there would be no intent to commit mail fraud, as a matter of law, if in fact the Raceway had not been defrauded. Nor could there be a conspiracy to achieve a purpose that did not exist. Therefore, under Ottley and the cases contained in our opening brief, the Appellant's judgment of conviction should be reversed and a new trial should be granted.

Respectfully submitted,

Herald Price Fahringer
Attorney for Appellant

Service of 3 copies of the within Brief is hereby admitted this 15th day of April 1976

Signed Murdoch Kemp

Attorney for Respondent

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5115)